BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

BETTY J. TURNER	)	
Claimant	)	
V.	)	
	)	
STATE OF KANSAS	)	Docket Nos. 1,039,060
Respondent	)	& 1,062,703
AND	)	
	)	
STATE SELF INSURANCE FUND	)	
Insurance Fund	)	

ORDER

Respondent and insurance fund (respondent), by Nathan D. Burghart, of Lawrence, requested review of the May 21, 2015 Award & Review and Modification Award by Administrative Law Judge Rebecca Sanders. George H. Pearson, of Topeka, appeared for claimant. The Board heard oral argument on October 6, 2015.

RECORD AND STIPULATIONS

The Board has carefully considered the entire record and adopted the stipulations listed in the Award & Review and Modification Award, and the documents in the administrative file, including the Board's June 24, 2009, Order.

ISSUES

In the Review and Modification Award in Docket No. 1,039,060, the judge found claimant sustained an additional 5% permanent functional impairment as a natural and probable consequence of claimant's December 22, 2006 accidental injury, and claimant is permanently and totally disabled effective May 12, 2012. The judge awarded medical treatment, a conclusion not challenged on appeal. In Docket No. 1,062,703, the judge denied benefits after finding claimant did not sustain a new injury on May 12, 2012, but rather an aggravation of her prior injury. The decision in Docket No. 1,062,703 was not appealed and the parties agreed the decision in such case was not at issue.

Respondent argues claimant is not permanently and totally disabled and claimant is not entitled to review and modification because she did not have any increased functional impairment or task loss. Claimant requests the Board affirm the decision.

The issues are:

1. Is claimant entitled to review and modification?

2. If so, what is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant, currently 62 years-old, worked for respondent at the Kansas Neurological Institute. She injured her back while lifting a bucket of water on December 22, 2006. She had low back pain that went into her right buttock, right leg and toes. She was provided conservative treatment before being referred to Michael Smith, M.D., a board certified orthopedic surgeon.

Claimant was initially seen by Dr. Smith on March 27, 2007, with complaints of low back and bilateral leg pain and weakness. Dr. Smith ordered an EMG, which was judged normal, and he reviewed a February 6, 2007 MRI scan which revealed degeneration at L4-5 and L5-S1, bulging at the L4-5 disc and widened facet joints. Dr. Smith diagnosed spondylolisthesis and degeneration at the L4-5 facet joints. Surgery was discussed, but claimant was afraid her condition would worsen. On December 4, 2007, Dr. Smith released her from treatment at maximum medical improvement (MMI) with permanent light duty restrictions consisting of occasional lifting up to 20 pounds, frequent lifting of up to 10 pounds, and walking limited to 30 minutes in an eight hour work day.

Dr. Daniel Zimmerman, a board certified independent medical examiner, examined claimant on April 4, 2008, at claimant's attorney's request. Dr. Zimmerman found claimant had severe lumbar range of motion deficit, lumbar muscular tenderness, right leg radiculopathy, numbness and weakness, and slight left leg weakness. Claimant was in too much pain to perform heel, toe and tandem walking. Based on the American Medical Association *Guides to the Evaluation of Permanent Impairment,* 4th Edition (the *Guides*), Dr. Zimmerman rated claimant as having a 33% permanent partial impairment to the whole body using the range of motion model.

The judge entered an Award on January 22, 2009, based on a 33% whole person functional impairment. Dr. Zimmerman's rating was the only impairment rating in evidence. Respondent appealed the Award, which the Board affirmed on June 24, 2009.

Claimant's testimony is inconsistent and confusing. During an October 23, 2008 regular hearing, she testified she returned to light duty work after her 2006 injury and was still working light duty at the time of the hearing. However, during an October 23, 2014 hearing, claimant testified she returned to her regular work after the 2006 injury without restrictions. The hearing was discontinued because claimant had taken Tramadol that day and her answers were confusing. At a January 23, 2015 deposition, claimant testified she had light duty restrictions after her 2006 injury, but respondent never followed her restrictions, except for perhaps one day, and had her do regular duty. According to claimant, when her supervisor told her to do something outside of her restrictions, she did it to keep her job.

Claimant returned to Dr. Smith on April 20, 2012. The doctor noted claimant's symptoms had been especially bad over the prior six months. In addition to pain radiating into her right leg, claimant reported a lesser degree of similar left leg symptoms and bilateral leg weakness. Dr. Smith recommended an EMG and an MRI of claimant's lumbar spine. Dr. Smith indicated claimant could do her regular job.

The EMG and the MRI were conducted on April 26, 2012. The EMG revealed right L5-S1 radiculopathy and some neuropathy. The MRI showed degeneration at L4-5, L5-S1, and instability at L4-5, indicating spondylolisthesis.

Claimant testified she again injured herself using a floor scrubbing machine on May 12, 2012. She lost control of the machine, it knocked her down and she fell to the tile floor. She testified she jarred her whole back, pain shot up her back and down into her leg and foot and made her condition worse. Claimant asserted her back hurt constantly ever since. She acknowledged having right lower extremity numbness and tingling after both the 2006 and 2012 accidents, but indicated the subsequent accident worsened her symptoms. Claimant testified she never worked for respondent, or any other employer, after May 12, 2012.

Dr. Smith saw claimant on May 15, 2012. His associated report did not mention a new injury. Claimant's admitting sheet indicated she hurt herself lifting a bucket of water.

In a June 19, 2012 report, Dr. Smith indicated claimant fell to the floor at work on May 17, 2012, and had significant complaint. The doctor opined claimant had an aggravation of a preexisting condition. He restricted claimant to sedentary duty and referred her to another doctor for facet injections at L4-5. Claimant had three injections with only short-term benefit. Dr. Smith discussed surgical treatment with claimant, which she declined. Dr. Smith felt claimant was at MMI on October 9, 2012. Claimant's restrictions were the same in 2012 as they were in December 2007.

Sometime in 2012, claimant started receiving social security disability benefits. She is on Medicare.

Claimant again returned to Dr. Smith on September 20, 2013. Dr. Smith suggested another facet injection. Claimant testified she gave respondent Dr. Smith's restrictions and was told respondent had no any work for her. Claimant testified she would have returned to work if respondent would have accommodated her 20 pound weight limit. However, claimant also stated she was incapable of working because she hurts all of the time, takes a lot of medication and cannot sit or stand for very long. Claimant asserted her back pain causes her to be dizzy and unbalanced. Claimant says she uses a TENS unit every day. She takes gabapentin for pain and cyclobenzaprine, a muscle relaxant. In claimant's opinion, she is incapable of substantial, gainful employment and is permanently totally disabled.

After the 2009 Award, three doctors and three vocational experts testified. The doctors obtained a history from claimant, reviewed medical records and performed physical examinations. The vocational experts created task lists and commented on claimant's employability.

Dr. Smith testified claimant's current condition is secondary to degenerative changes in her lower back. According to Dr. Smith, claimant's 2006 accidental injury caused aggravation of her degenerative changes and her 2012 condition was also an aggravation of her degenerative condition. Dr. Smith testified the condition for which he treated claimant from 2012 forward was the natural and probable progression of the degenerative condition she manifested in 2007. The doctor noted claimant's 2012 EMG showed a worsening, which is expected with a degenerative condition.

On November 12, 2013, Edward Prostic, M.D., an orthopedic surgeon, evaluated claimant at her attorney's request. Claimant had limited lumbar range of motion, limited ability to squat and right hamstring tightness. Dr. Prostic connected claimant's right leg symptoms and L4-5 pseudospondylolisthesis as caused or contributed to by her 2012 accident. He did not know such conditions preexisted and were part of the 2006 claim. Prior to his deposition, Dr. Prostic did not have Dr. Smith's records dated before the asserted 2012 accidental injury. Dr. Prostic believed claimant had no permanent work restrictions and worked full duty before May 12, 2012. Dr. Prostic also did not know about Dr. Smith's prior restrictions.

Dr. Prostic noted claimant's 2007 EMG was negative for radiculopathy, but her April 26, 2012 EMG was positive. He opined the prevailing factor for her radiculopathy was her May 12, 2012 accidental injury. Dr. Prostic testified claimant had an overall 25-30% lumbar impairment under the *Guides* and her 2012 injury resulted in a 5% rating.

Dr. Prostic's permanent restrictions for claimant were light duty, minimal use of vibrating equipment, and avoiding frequent bending or twisting at the waist, forceful pushing or pulling and captive positioning. Dr. Prostic reviewed a task list compiled by Bud Langston, a certified vocational rehabilitation counselor, concerning only tasks claimant performed in the five years before her 2012 injury. Using this list, Dr. Prostic opined claimant had a 75% task loss due to the 2012 accident. After reviewing Dr. Smith's restrictions in connection with the 2006 injury, Dr. Prostic noted there were only two more tasks claimant could not perform after her 2012 injury. Dr. Prostic did not state claimant was permanently and totally disabled and agreed claimant could do light duty work.

Peter Bieri, M.D., board certified in disability evaluation, evaluated claimant on March 31, 2014, at the judge's request. Dr. Bieri found claimant had decreased lumbar range of motion, moderate low back tenderness, diminished ankle reflexes in both legs, sensory loss into her right first and second toes, positive straight leg raising and decreased strength, but no tissue atrophy.

Dr. Bieri's impression was claimant had a new injury in 2012 that caused right leg radiculopathy documented by an EMG. Under the *Guides*, Dr. Bieri testified claimant's total impairment for the 2006 and 2012 injuries was 25% to the whole person, with 5% from the 2012 injury. Dr. Bieri did not agree with Dr. Zimmerman's rating.

Dr. Bieri agreed claimant was at a light physical demand level, limiting occasional lifting to 20 pounds, frequent lifting not to exceed 10 pounds and negligible constant lifting. Dr. Bieri testified incorrectly that claimant was not under permanent restrictions prior to the 2012 injury.

Dr. Bieri reviewed a task list prepared by Steve Benjamin, a vocational rehabilitation counselor. The list only concerned tasks claimant performed for five years preceding her 2012 injury. Dr. Bieri restricted claimant from five of 19 tasks for a 26% task loss. Mr. Benjamin also created a list of 34 tasks for the 15 years preceding claimant's 2006 injury. Dr. Bieri restricted claimant from six of those job tasks. Based on Mr. Langston's list, Dr. Bieri concluded claimant had a 38% task loss due to her 2012 accidental injury. Dr. Bieri testified claimant is capable of engaging in substantial and gainful employment within his restrictions and is not permanently totally disabled.

Dick Santner, a licensed certified vocational rehabilitation counselor, evaluated claimant at the request of her attorney. Mr. Santner met with claimant in October 2013 and March 2015. He noted claimant had an 11th grade education and no GED. Initially, based on Dr. Prostic's restrictions, Mr. Santner thought claimant might be able to work as a part-time companion, going to homebound peoples' residences to provide care, although she would not be able to help individuals walk or get in or out of a wheelchair. However, after reviewing Dr. Bieri's report documenting increased functional impairment, claimant's altered gait/difficulties walking, and the fact claimant had to get out of her chair four times during his two hour interview with her, Mr. Santner testified claimant was not realistically employable. He also indicated claimant's education, unskilled work experience, age and presentation would impede employment. Mr. Santner acknowledged claimant has no restriction from full-time employment, but he did not feel full-time work would exist for her. Mr. Santner put himself into the position of a potential employer and determined more probably true than not, claimant would not find a job. Claimant also told Mr. Santner she viewed herself as unemployable.

Mr. Benjamin evaluated claimant at the request of respondent's counsel. Mr. Benjamin determined claimant could be a housekeeper, a cleaner in a hotel or offices or be a companion/home attendant, cleaning, cooking and running errands. Mr. Benjamin determined claimant could earn entry level wages and earn an average of $321.60 per week, based on a 40 hour work week. Mr. Benjamin did not feel claimant was permanently totally disabled. Instead, he opined she was capable of engaging in substantial and gainful employment.

Mr. Langston evaluated claimant on December 11, 2013, at the request of her attorney. Claimant does not have computer, clerical or secretarial type skills. Clamant did not do any tasks or have skills transferable to light exertion work. She only did unskilled work and as an unskilled sedentary worker, Mr. Langston indicated she qualified for about 3% of the total labor market. In addition to her lack of a high school degree or a GED, claimant reported she was diagnosed with a learning disability and had difficulty reading and writing. Mr. Langston testified when he met with claimant, she was not able to understand his questions and interact appropriately.

With claimant's education, training and age, and the current labor market, with Dr. Prostic's restrictions, Mr. Langston found no jobs for claimant. Mr. Langston testified with Dr. Smith's restrictions, claimant could not do light exertion work because it required standing or walking up to six hours out of an eight hour work day. Mr. Langston agreed claimant performed light work from 2007 to 2012. Initially, Mr. Langston testified he was not certain claimant was permanently and totally disabled, but it would be difficult, if not impossible, for her to find a job with her restrictions. Ultimately, in Mr. Langston's opinion, claimant was realistically unemployable based on her restrictions, experience, age, and inability to learn.

Mr. Langston testified physically claimant could be a companion, but would be unable to react in an emergency. Mr. Langston testified claimant would have difficulty with a driving job. A cab driver must help people lift luggage and claimant would not be able to get a CDL for city bus driver or that type of jobs. Mr. Langston conceded claimant could do light housekeeping, such as dusting and changing bed linens, but it would not be a full-time job.

Pages 9-10 of the Award state:

> [T]he Court concludes that any additional disability of impairment that Claimant has is the natural and probable consequence of her 2006 injury. The evidence is not persuasive that Claimant suffered a new injury rather it is an aggravation of her prior accidental injury.
>
> The next issue is whether or not Claimant has suffered an additional disability or impairment as a result of the May 12, 2012 accident. Two doctors testified that Claimant has an additional five percent body as a whole impairment since the award was entered on January 26, 2009. Dr. Smith indicated it is possible that Claimant has additional impairment. An EMG done in 2012 was positive for radiculopathy and is a new finding. Such a finding is sufficient to justify an additional five percent impairment of the body as a whole. It is found and concluded that Claimant has an additional five percent impairment that was the natural and probable consequence of Claimant's 2006 accident.

> Respondent points out that the two doctors who testified as to the extent of Claimant's impairment due to both the 2006 accident and the 2012 accident is at most thirty percent impairment to the body as a whole. Claimant is not entitled to an additional five percent impairment because the original award found Claimant has a thirty-three percent impairment to the body as a whole. That award was made because Respondent presented no medical evidence at all. The Court had no choice but to award based on the only medical evidence presented. Claimant is not going to be penalized because Respondent failed to present medical evidence at the time the first award was entered. There is objective medical evidence to justify an additional five percent impairment, specifically an EMG documenting radiculopathy.
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> . . .
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> The next issue is whether Claimant should be awarded benefits based on wage loss and task loss or that Claimant is permanently and totally disabled. Claimant is sixty-two years old. She does not have a high school degree. Most of her work history is as janitor/heavy housekeeping. She has physical restrictions. She has difficulty walking. Claimant has difficulty reading and writing. Claimant also has difficulty understanding and answering questions put to her. It is not likely that Claimant can find or maintain substantial gainful employment. Claimant is permanently and totally disabled.
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> Respondent shall authorize a doctor to manage Claimant's medication and pain.
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> . . .
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> Claimant's award shall be modified to permanent and total award effective from May 12, 2012.

PRINCIPLES OF LAW

K.S.A. 2006 Supp. 44-501(a) states an employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment. The burden of proof is on claimant to establish her right to an award of compensation and the trier of fact shall consider the whole record.

K.S.A. 44-510c(a)(2) (Furse 2000), defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, shall, in the absence of proof to the contrary, constitute a permanent total disability. . . . In all other cases permanent total disability shall be determined in accordance with the facts.

Case law indicates permanent and total disability is based on a totality of the circumstances, including work-related injuries, medical findings, task loss, as well as the worker's age, training, past work history, pain level and work restrictions.[1]

The Kansas Court of Appeals held, "The trial court's finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent."[2] *Wardlow* has been followed in numerous cases.[3]

K.S.A. 44-528(a) (Furse 2000) states:

> (a) Any award or modification thereof agreed upon by the parties . . . may be reviewed by the administrative law judge for good cause shown . . . . . The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.

K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.[4] Our appellate courts have held that there must be a change of circumstances, either in a claimant's physical or employment status, to justify modification of an award.[5] The change does not have to be a change in claimant's physical condition. It could be an economic change, such as a claimant returning to work at a comparable wage,[6] or losing a job because of a layoff.[7]

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[1] See *Wardlow v. ANR Freight Systems,* 19 Kan. App. 2d 110, 114, 872 P.2d 299 (1993).

[2] *Id.* at 113.

[3] See *Blankley v. Russell Stover Candies, Inc.*, No. 110,014, 2014 WL 2590035 at *3 (Kansas Court of Appeals unpublished opinion filed May 30, 2014); *Loyd v. ACME Foundry, Inc.*, No. 100,695, 2009 WL 3378206 at *5 (Kansas Court of Appeals unpublished opinion filed Oct. 16, 2009); and *Lyons v. IBP, Inc.*, 33 Kan. App. 2d 369, 102 P.3d 1169 (2004).

[4] *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

[5] *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978).

[6] *Ruddick v. Boeing Co.*, 263 Kan. 494, 949 P.2d 1132 (1997).

[7] *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, 372, 899 P.2d 516 (1995).

"When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury."[8] Whether an injury is a natural and probable result of previous injuries is generally a fact question.[9]

"Once the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable under the Kansas Workers Compensation Act so long as the worsening is not shown to have been produced by an independent nonindustrial cause."[10] *Nance* further states, "The passage of time in and of itself is not a compensable injury. Thus, where the deterioration would have occurred absent the primary injury, it is not compensable. However, where the passage of time causes deterioration of a compensable injury, the resulting disability is compensable as a direct and natural result of the primary injury."[11]

Board review of a judge's order is de novo on the record.[12] The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[13] The trier of fact must decide which testimony is more accurate and/or credible and may adjust the medical testimony (without being bound by the medical evidence) with the testimony of claimant and any other testimony relevant to the issue of disability.[14]

ANALYSIS

Changes in claimant's condition warrant review and modification of claimant's 2009 Award. Claimant's physical condition worsened after her 2006 injury according to Drs. Smith, Prostic and Bieri. Claimant also had a change of circumstances when she lost her job. The Board concludes both claimant's physical worsening and her job loss justify an increased award.

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[8] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[9] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶ 1, 128 P.3d 430 (2006).

[10] *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 3, 952 P.2d 411 (1997).

[11] *Id.* at 550.

[12] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[13] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[14] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991), *superseded on other grounds by statute.*

Respondent argues claimant has no worsening because she had a judicially-determined 33% impairment due to her 2006 injury and the medical experts now indicate she has an overall impairment of 25-30%. Respondent also argues claimant has no new restrictions after 2012 as compared to the restrictions from her 2006 injury. However, claimant does not need an increase in her functional impairment or a change in restrictions to justify increasing her disability to being permanent and total. The question under *Wardlow* is whether claimant is not realistically and essentially incapable of employment or, under K.S.A. 44-510c(a)(2), if she is completely and permanently unable to engage in any type of substantial and gainful employment.

While the medical experts indicated claimant could perform limited work and none of them stated she was permanently and totally disabled, the Board nonetheless concludes claimant is permanently and totally disabled. Claimant is limited to light duty work at best. Both Mr. Langston and Mr. Santner concluded claimant was not realistically employable. We reject as unrealistic Mr. Benjamin's opinion that claimant would be able to find employment. When considering claimant's injury and the factors spelled out in *Wardlow,* it is improbable she could obtain substantial and gainful employment. We agree with the judge's rationale for finding claimant to be permanently and totally disabled.

We agree with the judge that claimant's worsened condition in 2012 was the direct, natural and probable consequence of her original and primary 2006 accidental injury, such that it is compensable as part of the 2006 injury under *Jackson* and its progeny.[15] Dr. Smith was in the best position to determine claimant had an aggravation of a preexisting degenerative lumbar condition in 2006 and a subsequent aggravation of such condition in 2012. The opinions of Drs. Prostic and Dr. Bieri that claimant had a separate and new accidental injury in 2012 are not as convincing, largely because both physicians pointed to claimant's April 26, 2012 EMG as proof of a new accidental injury. However, the EMG predated claimant's May 12, 2012 accident by 17 days.

CONCLUSIONS

Having carefully reviewed the entire evidentiary file, the Board finds that claimant is permanently and totally disabled as a result of her December 22, 2006 accidental injury.

AWARD

WHEREFORE, the Board affirms the May 21, 2015 Review and Modification Award to the extent it is consistent with our ruling.

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[15] Because the rights of the parties flow from claimant's 2006 injury, the 2011 amendments to the Kansas Workers Compensation Act do not apply. *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 588, 257 P.3d 255 (2011).

IT IS SO ORDERED.

Dated this _____ day of January, 2016.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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